Supreme Court, U.S.
FILED
NOV 29 2000
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No. 00-429

IN THE

Supreme Court of the United States

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA AND PRUDENTIAL HEALTH CARE PLAN OF CALIFORNIA, INC.,

Petitioners,

v.

DAVID E. SINTEK, D.D.S.,

Respondent.

On Petition For A Writ of Certiorari To the California Court of Appeal, Fourth Appellate District

REPLY BRIEF IN SUPPORT OF PETITION

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November 29, 2000

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REPLY BRIEF IN SUPPORT OF PETITION[1]

The petition showed that this case squarely presents an important question over which both the state and federal courts are sharply divided: whether the FAA's core purpose of enforcing arbitration agreements according to their terms prohibits courts from ordering classwide arbitration that is not authorized by the parties' arbitration agreement.

Respondent's brief challenges this Court's jurisdiction and then argues that review is not warranted because the decision below is unpublished, the conflict can be explained away, or the conflict need not be resolved. As we show herein, those contentions are plainly wrong.

This Court has jurisdiction under 28 U.S.C. § 1257(a) for two separate reasons. First, just as in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), jurisdiction exists because the decision below finally resolves a federal law issue, reversal of the state court will preclude any further litigation, and delayed review would erode federal policy. Second, jurisdiction exists because the lower courts' denial of mandamus constitutes a final judgment in that mandamus proceeding.

Respondent's other arguments are equally flawed. First, this Court frequently reviews unpublished state and federal court rulings. Second, the conflict presented here cannot be explained away by reference to the separate choice-of-law clause in the parties' contract, as shown by this Court's decision rejecting a similar argument in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). Finally, respondent's implicit concession that the conflict will encourage forum-shopping and impose litigation costs at odds with the goals of the FAA confirms that the Court should resolve the question presented here without delay.

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[1] Petitioners' Rule 29.6 statement is set forth at Pet. ii.

I. This Court Has Jurisdiction.

There are two separate reasons why this Court has jurisdiction here: (A) the Court of Appeal's judgment is a final ruling on a federal law issue that is immediately appealable under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); and (B) the ruling below constitutes a final judgment in a mandamus proceeding.

A. The first of these points is conclusively demonstrated by this Court's decision in *Southland*, which arose in almost the same posture. Here, as in *Southland*, the petitioners challenged a California statute on the ground that the statute is inconsistent with the parties' arbitration agreement and therefore is preempted by the FAA. And here, as in *Southland*, the California court rejected the federal law challenge and stayed arbitration pending further court proceedings.

Southland held that this Court has jurisdiction in this situation. It first set forth the general standard as follows:

> Under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975), judgments of state courts that finally decide a federal issue are immediately appealable when 'the party seeking review here might prevail [in the state court] on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . .' In these circumstances, we have resolved the federal issue 'if a refusal immediately to review the state-court decision might seriously erode federal policy.' *Id.*, at 483.

Southland, 465 U.S. at 6. The Court then held that it had jurisdiction under this test because (1) "[w]ithout immediate review of the California holding by this Court there may be no opportunity to pass on the federal issue," which would leave in

effect an unreviewed decision that "the California statute does not conflict with the Federal Arbitration Act" (*id.* at 6); (2) reversal of the state court judgment would terminate the litigation (*id.* at 6-7); and (3) "to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate" (*id.* at 7-8). Each aspect of that ruling is equally applicable in the identical circumstances presented here.

Respondent does not even mention *Southland*, and his reliance instead on *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), is clearly misplaced. *Jefferson* simply did not involve the rule from *Cox* that this Court invoked in *Southland.* In particular, *Jefferson* was not a case where immediate resolution of the federal law issue would have ended the case or was needed to avoid harm to federal policy.

B. This Court also has jurisdiction because the decision below constitutes a final judgment in a mandamus proceeding. "Petitions for writ of mandamus . . . have . . . been seen as distinct lawsuits for purposes of the finality determination." 22 James Wm. Moore, et al., MOORE'S FEDERAL PRACTICE § 406.03(3)(b)(i) (3d ed. 2000). As then-Justice Rehnquist explained in another case in which the California courts had denied a petition for a writ of mandamus, the "petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the California Supreme Court's [denial]." *Board of Educ. v. Superior Ct.*, 448 U.S. 1343, 1346 (1980) (Rehnquist, J., in chambers). Therefore, then-Justice Rehnquist held, "this Court would in all probability have jurisdiction over the present action." *Id.*

The California Court of Appeal expressly treated the instant matter as a petition for a writ of mandate (Pet. App. 4a) and engaged in plenary review, including final adjudication of the federal law issue (*id.* at 4a-11a). Its ruling denying a writ of

mandate, together with the California Supreme Court's denial of review, therefore constitutes a final judgment in a mandamus proceeding that is within this Court's jurisdiction under § 1257.

II. The Fact That The Opinion Below Is Unpublished Is No Basis For Denying Review.

Respondent argues (at 8-10) that this Court should not grant certiorari because the California Court of Appeal's decision was unpublished. This Court, however, often grants certiorari in cases with unpublished decisions. In fact, in the last Term alone, this Court granted review of two unpublished decisions from the California Courts of Appeal,[2] as well as numerous other unreported rulings.[3] Needless to say, courts cannot shield their decisions from this Court's review by declining to publish them.

Respondent's argument in fact highlights one of the reasons why review should be granted here. The Court of Appeal's conclusion not to publish its decision may reasonably be attributed to that court's view that its decision was required, as a

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[2] See, *e.g.*, *Hunt-Wesson Inc. v. California Franchise Tax Bd.*, unpub'd op (Cal. Ct. App. Dec. 11, 1998), *cert. granted*, 68 U.S.L.W. 3176 (U.S. Sept. 28, 1999) (No. 98-2043); *Martinez v. California Ct. of Appeal*, unpub'd op (Cal. Ct. App. Oct. 16, 1998), *cert. granted*, 68 U.S.L.W. 3039 (U.S. July 20, 1999) (No. 98-7809).

[3] See, *e.g.*, *Glover v. United States*, unpub'd op (7th Cir. July 15, 1999), *cert. granted*, 68 U.S.L.W. 3783 (U.S. June 27, 2000) (No. 99-8576); *Carrillo v. Salmon*, unpub'd op (9th Cir. Nov. 13, 1998), *cert. granted*, 68 U.S.L.W. 3544 (U.S. Feb. 29, 2000) (No. 98-1473); *Carter v. United States*, unpub'd op (3d Cir. June 16, 1999), *cert. granted*, 68 U.S.L.W. 3385 (U.S. Dec. 14, 1999) (No. 99-5716); *Johnson v. United States*, unpub'd op (6th Cir. Apr. 29, 1999), *cert. granted*, 68 U.S.L.W. 3257 (U.S. Oct. 19, 1999) (No. 99-5153); *Slack v. McDaniel*, unpub'd op (9th Cir. July 7, 1998), *cert. granted*, 68 U.S.L.W. 3039 (U.S. July 20, 1999) (No. 98-6322).

matter of *stare decisis*, by the California Supreme Court's ruling in the *Southland* case. Pet. App. 5a-6a. Yet, as our petition showed (at 5), this Court sought to review precisely that ruling but could not because the federal issue was not properly presented there. Here, by contrast, the federal law issue left open by this Court in *Southland* is ripe for resolution.

III. Respondent's Effort To Explain Away The Many Conflicting Decisions Is Unpersuasive.

The petition demonstrated (at 6-13) that the decision below conflicts with rulings from numerous other state and federal courts. Respondent seeks to paper over that conflict by arguing (at 10-16) that the contract's inclusion of a separate choice-of-law provision stating that the contract would be governed by California law means that Prudential agreed that arbitration would be conducted in accordance with California procedural statutes. That argument is wrong for at least three reasons and does not explain away the conflict.

First, neither the trial court nor the Court of Appeal relied on or even cited to the choice-of-law provision. As such, the courts below plainly did *not* hold that Prudential had, through the choice-of-law clause, consented to the application of California procedural law. To the contrary, they held that the California law permitting consolidation was to be applied regardless of the lack of consent (Pet. App. 4a-9a).

Second, respondent's choice-of-law argument is closely analogous to the argument rejected by this Court in *Mastrobuono*. The respondent there argued that the arbitration rules were controlled by the contract's general choice-of-law clause, which said that the contract would be "governed by the laws of the State of New York." *Mastrobuono*, 514 U.S. at 53. In rejecting that argument, the Court held:

> "We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of

> the State of New York' to encompass the substantive principles that New York courts would apply . . . . Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration . . . ."

Id. at 63-64. That reasoning is equally applicable here. Although the contract here contains a general choice-of-law clause (in a separate section of the contract), the arbitration clause specifically states that arbitration is to be conducted "in accordance with the commercial arbitration rules of the American Arbitration Association." Pet. App. 19a. It is hornbook law that the specific statement that arbitration will be conducted under the AAA rules trumps the general designation that California law applies to the contract. See, *e.g.*, 5 *Corbin on Contracts* § 24.23 (1998) (citing *Restatement (Second) of Contracts* § 203 (1979)).[4]

Third, respondent's argument runs afoul of this Court's teaching that when the parties to an agreement choose a particular state as the source of governing law, they also incorporate the limitations that federal law imposes on such state law. In *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 157 (1982), for example, this Court held that

> "the incorporation of state law does not signify the inapplicability of federal law, for 'a fundamental principle in our system of complex national polity' mandates that 'the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.'"

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[4] See also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a special tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute."); cases cited at Pet. 12-13.

Thus, when the parties here agreed to be governed by California law, they did not adopt California law to the extent that it is preempted by the FAA.

For these reasons, it is not surprising that courts have repeatedly rejected arguments that a contract's general choice-of-law clause should be construed to govern the arbitration process under the FAA. See, *e.g.*, *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1131 (9th Cir. 2000) ("[G]eneral choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators."); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 996-97 (8th Cir. 1998) (court will not interpret choice-of-law clause to trump arbitration provisions unless contract is "abundantly clear" in that respect); *Ferro Corp. v. Garrison Indus.*, 142 F.3d 926, 938 (6th Cir. 1998) ("Most contracts include a choice-of-law clause, and, thus, if each of these clauses were read to foreclose the application of the substantive law enacted by Congress in the FAA, the FAA would be applicable in very few cases."); *Home Ins. Co. v. New England Reins. Corp.*, 98 Civ. 5772 (JFK), 1999 U.S. Dist Lexis 13421, *18-19 (S.D.N.Y. Aug. 31, 1999) (rejecting argument that choice-of-law clause incorporated state law authorizing consolidated arbitration); *Hyundai Am., Inc. v. Meissner & Wurst GmbH & Co.*, 26 F. Supp. 2d 1217 (N.D. Cal. 1998) (same).

In short, the decision below did not and could not rely on the contract's general choice-of-law clause as evidencing an agreement to proceed under California arbitration rules. Thus, respondent's effort to eviscerate the conflict among the courts by relying on that clause is meritless. At bottom, the decision below, like the First Circuit's decision in *New England Energy*, explicitly rests on the notion that "an order not contradicting [the parties'] contractual terms regarding arbitration is 'in accordance with [those] terms'" and thus complies with the FAA. Pet. App. 8a. That reasoning is precisely what many

decisions have rejected in holding that the FAA permits consolidated arbitration only when the arbitration clause authorizes such a process. See, *e.g.*, *Champ v. Siegel Trading Co.*, 55 F.3d 269, 271-76 (7th Cir. 1995), and the other cases cited at Pet. 6-10.

IV. Resolution Of The Conflict Is Vitally Important.

Respondent argues (at 21-23) that the reasons for deciding the question presented by this case are "not compelling." Respondent does not dispute that, as the petition showed (at 14-15), the fact that different courts will reach different results under the same circumstances – some will order classwide arbitration, while others will compel individual arbitration – will encourage forum shopping. Instead, respondent says (at 22) that Prudential cannot complain about such forum-shopping because it drafted the language of the contract. That argument constitutes a *non sequitur* – Prudential plainly never agreed that its FAA-based right to arbitrate under the AAA's rules would depend on who raced to court first, and to which court they went. Nor, in any event, does respondent's argument either negate the adverse impact of such forum shopping on the administration of justice or rebut the fact that, as this Court held in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995), "Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases."

Respondent also argues (at 22) that allowing courts to order classwide arbitration even where it is not contemplated by the parties' contract will not undermine the goals of the FAA. As the petition showed (at 15-16), however, that argument is refuted by the fact that numerous courts themselves have recognized that classwide arbitration necessarily involves (1) extensive class certification and notice proceedings in court, then (2) a much more complex arbitration process, and then (3)

potential collateral attacks in still further courts – all of which are plainly contrary to the basic purposes of the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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